

Workplace Mental Health Law: Due Diligence Legal Strategies

Presented by Arleen Huggins

November 14, 2017

CIVIL LITIGATION | CLASS ACTIONS | LABOUR LAW | PENSION & BENEFITS
20 QUEEN STREET WEST, SUITE 900 | TORONTO, ON M5H 3R3 | KMLAW.CA
KOSKIE MINSKY LLP

Employment law and mental health

Two angles:

- Dealing with employees' pre-existing or existing mental health issues
 - Guided by common law, *Human Rights Code* and *Accessibility for Ontarians with Disabilities Act*
- Ensuring a psychologically safe workplace to prevent mental health issues caused by the work environment
 - Workplace Harassment and Sexual Harassment under *Occupational Health and Safety Act*
 - Guided by the *National Standard for Psychological Health and Safety in the Workplace* designed to comply with legal requirements

Dealing with pre-existing and existing mental health disabilities

- **Duty to accommodate: Employer is obligated to:**

- Inquire into situations where there is reasonable basis to perceive that individual may be suffering from a mental health condition
- Intervene where employee is clearly unwell
- Maintain confidentiality and limit requests for information to what is reasonably related to restrictions. Note: Bill 148: An Act to Amend the *Employment Standards Act, 2000* and the *Labour Relations Act, 1995* and to make related amendments to other Acts ("Bill 148"), which passed Second Reading on October 18, 2017, stipulates that while employers have a right to ask for "evidence of entitlement" to personal emergency leave (which will increase to 10 days for all employers of which 2 days must be paid), they do not have the right to request a certificate from a health practitioner. If the employer is providing a greater benefit beyond the personal leave days, their policy can ask for a reasonable medical note **in respect of the excess days**. In no instance can an employer require disclosure of the diagnosis

31/10/2017

KOSKIE MINSKY LLP

3

Dealing with pre-existing and existing mental health disabilities, cont.

- Maintain good records of accommodation requests and actions taken
- Consult experts
- Canvass various forms of accommodation and consider employee requests in good faith to the point of undue hardship
- Have a process to develop individualized accommodation plans as required by *Accessibility for Ontarians with Disabilities Act*
- Consider and follow the obligations of the Ontario *Human Rights Code* and OHRC Psychosocial Disabilities Policy, June 18, 2014 (<http://www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions>)

31/10/2017

KOSKIE MINSKY LLP

4

Creating a psychologically healthy workplace

- **Duty to maintain harassment free workplace: Employer is obligated to:**
 - **Investigate incidents of harassment (including sexual harassment) and discrimination**
 - Bill 132 amendments
 - Ontario *Human Rights Code* & OHRC Psychosocial Disabilities Policy, June 18, 2014
 - **Have workplace harassment and sexual harassment policy and program as stipulated by *Occupational Health and Safety Act***
- **Employer can voluntarily adopt National Standard of Canada, Psychological Health and Safety in the Workplace Management System**

31/10/2017

KOSKIE MINSKY LLP

5

Reducing legal concerns

- **Risk management is a key benefit of implementing the *National Standard* - a mentally healthy workplace reduces legal concerns for employers**
 - WSIB complaints
 - AODA complaints
 - Ministry of Labour complaints under the *OHSA*
 - Human Rights applications/complaints
 - STD/LTD claims
 - Grievances
 - Negligence, discrimination, harassment or breach of contract actions
 - Performance problems
 - Conflict or morale issues
 - Retention and recruitment
 - Injury and absenteeism
 - Employee turnover

31/10/2017

KOSKIE MINSKY LLP

6

Where can we work together?

- **Occupational Health and Safety Committees, occupational health nurses, unions and employers' roles and interests crossover in:**
 - Voluntarily creating guidelines and a “psychological health and safety management system” as per *National Standard of Canada*, Psychological Health and Safety in the workplace
 - Creating accommodation plans
 - Dealing with mental health related performance issues
 - Harassment and discrimination investigations
 - **Your ideas?**

31/10/2017

KOSKIE MINSKY LLP

7

Workers' Compensation Claims

It has been a struggle to attain WSIB coverage for mental stress injuries:

- Historically, the *Workplace Safety and Insurance Act* precluded coverage for mental stress injuries.
- In 2014, the WSIAT found that this exclusion unjustifiably infringed section 15(1) of the *Charter* (in *Decision No. 2157/09*).
- In response the Ontario Government amended the *WSIA* in 2016 and 2017 to allow entitlement for:
 - first-responders diagnosed with PTSD; and
 - chronic mental stress injuries (e.g. from workplace bullying)
- In October, 2017, the WSIB issued a new policy that limits entitlement for chronic mental stress to circumstances where the work-related stressor was the predominant cause of the mental stress injury (Policy 15-03-14) (attached).

This Policy:

- will preclude entitlement for many who have diagnosed pre-existing mental illnesses; and
- is inconsistent with thin skull principle.

31/10/2017

KOSKIE MINSKY LLP

8

Workers' Compensation Claims

WSIB Policy 15-03-14: A worker is entitled to benefits for chronic mental stress arising out of and in the course of the worker's employment.

A worker is *not* entitled to benefits for chronic mental stress caused by decisions or actions of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

Standard of proof and causation: In all cases, the WSIB decision-maker must be satisfied, on a balance of probabilities, that the substantial work-related stressor

- arose out of and in the course of the worker's employment, and
- was the predominant cause of an appropriately diagnosed mental stress injury.

(http://www.wsib.on.ca/WSIBPortal/faces/WSIBDetailPage?cGUID=WSIB070670&rDef=WSIB_RD_ARTICLE)

Workers' Compensation Claims

Situation	Likely Entitled to Benefits?
Traumatic Mental Stress A construction worker develops PTSD after witnessing a horrific workplace accident.	Yes
Chronic Mental Stress A teacher is the subject of demeaning comments from her vice-principal on a regular basis, quite often in front of colleagues and develops an anxiety disorder.	Yes
Excluded A grocery store clerk's shift schedule is changed by the employer	No
A general labourer has been observed breaking company safety rules, and is suspended.	No
Probationary employee is not offered permanent employment	No

(http://www.wsib.on.ca/WSIBPortal/faces/WSIBDetailPage?cGUID=WSIB070670&rDef=WSIB_RD_ARTICLE)

Case Study

Work together to consider the case study



31/10/2017

KOSKIE MINSKY LLP

11

Mental Health Case Study Scenario

Raul worked for Acme Inc. for 7 years. Acme is a stressful work environment because of the high time pressures everyone is under to create widgets as efficiently as possible. Raul is a supervisor on the factory floor. Raul's manager Melinda runs a tight ship and doesn't always speak respectfully to her employees. Last year, Raul witnessed an incident where someone was badly injured on the shop floor and it really upset him, but when he approached Melinda about what help might be available, she told him to toughen up and carry on with his work.

For the last few months, Raul's behaviour has become increasingly erratic. He's been calling in sick more often than he used to, especially when he's assigned to supervise the equipment where the accident happened. Raul's employees have also mentioned to Melinda that Raul has been irritable and prone to angry outbursts, often snapping at employees when they approach him. Moreover, Melinda has noticed that Raul often seems to be off in his own world – he's been careless in his paperwork and often seems to forget instructions she's given him. Melinda is getting fed up with Raul's behaviour and believes he should be terminated for cause.

Meanwhile, in Acme's head office, Sonia has been working as Manager of Sales for two years. Although she was diagnosed with bipolar disorder ten years ago, she's been on medication that works well for her and regularly sees a psychiatrist. Recently, a change in her medications has made the symptoms of her bipolar disorder more prominent. She has been making sexually suggestive jokes around her male subordinates and sometimes offering massages or asking them out for drinks. One of her direct reports, Francis, has become very uncomfortable with Sonia's advances and has reported her for workplace harassment to the head of the Health and Safety Committee. Upon hearing that Francis had made a complaint against her, Sonia disclosed her disability to HR.

The Health and Safety Committee has discussed the problem and decided to carry out an investigation. The outcome of the investigation was that Sonia's conduct was harmful to staff and under Acme's workplace sexual harassment policy she was unfit to continue in her position and would be permanently assigned to a different position with no supervisory responsibilities.

31/10/2017

KOSKIE MINSKY LLP

12

Questions for Discussion

Raul

1. What are Acme's obligations to Raul? Can Acme terminate him for cause?
2. Do Acme's obligations change if Raul doesn't acknowledge a mental health disability?
3. What role could Acme's Health and Safety Committee or Occupational Health Nurse have played to prevent the problems Raul is experiencing?

Sonia

1. What are the employer's competing obligations in this situation?
2. What should the Health and Safety Committee be aware of when conducting and acting on the outcome of their investigation?
3. What role could the Occupational Health Nurse play in assisting Sonia?

31/10/2017

KOSKIE MINSKY LLP

13

Case Law Review

AGDA Group Consultants Inc. v. Lane, 2008 CanLII 39605 (Div Ct) – 1 of 2

- Employee did not disclose bipolar disorder during interview process, but informed manager during first few days of work.
- Employee advised that his behavior should be monitored, and offered contingency plans in case he exhibited symptoms (e.g. emergency contact).
- Employee exhibited some pre-manic behaviour during his first week.
- Employer terminated his employment on his 8th day, claiming he could not perform essential duties and had been dishonest during interview process.
- Tribunal held:
 - employee had no obligation to disclose during interview process, and
 - employer had failed to even consider whether employee could be accommodated.

31/10/2017

KOSKIE MINSKY LLP

14

Case Law Review

AGDA Group Consultants Inc. v. Lane, 2008 CanLII 39605 (Div Ct) - 2 of 2

- Divisional Court upheld Tribunal's decision. Divisional Court decision sets out employers' procedural duty to accommodate:

"The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. It could include information about the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternate work. The term undue hardship requires respondents in human rights cases to seriously consider how complainants could be accommodated. A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the 'procedural' duty to accommodate."

31/10/2017

KOSKIE MINSKY LLP

15

Case Law Review

Krieger v. Toronto Police Services Board, 2010 HRTO 1361

- Police officer developed PTSD as a result of an on-duty incidents. Behaviour raised concerns, although supervisors suspected mental health problems.
- Attempts by officer to raise medical evidence treated with derision during termination; officer terminated.
- Employer failed to follow procedural duty to accommodate – they recognized he was "clearly unwell" but did nothing to accommodate him.
- Award of reinstatement, damages of \$35,000 and employer required to develop accommodation policy.

31/10/2017

KOSKIE MINSKY LLP

16

Case Law Review

Keays v. Honda Canada Inc., 2008 SCC 39

- Keays suffered from Chronic Fatigue Syndrome, and was absent several days each month as a result.
- Honda was aware of his condition, but disciplined him and placed him in a “special program” requiring a doctor’s note for every absence.
- Honda requested Keays see a company physician, which he did.
- Honda then requested that Keays see a second company physician, but refused to provide a reason.
- Keays refused, unless Honda provide a reason.
- Trial judge found the “special program” was discriminatory, and the second medical request was unreasonable as it was not made in good faith.
- Decision was upheld at each level of appeal. SCC awarded 15-months notice in damages.

31/10/2017

KOSKIE MINSKY LLP

17

Case Law Review

Gaisiner v Method Integration (Nov 27, 2014, 2014 HRTO 1718)

- Employee disclosed ADHD; employer ultimately decided to terminate for poor performance.
- Employer failed in duty to accommodate by not considering impact of disability on job performance or creating individualized accommodation plan – googling ADHD not sufficient.

MacLeod v Lambton County No. 2 (Sept 10, 2014, 2014 HRTO 1330)

- Manager living with bipolar, symptoms became more pronounced and harmful to co-workers.
- Investigation resulted in permanent removal from position.
- Employer failed to consider that conduct was disability related.

31/10/2017

KOSKIE MINSKY LLP

18

Case Law Review

Halton District School Board v OSSTF (Jan 19, 2015, CanLII 1394 (ONLA))

- Teacher with mental disability refused to acknowledge any needs requiring accommodation.
- Failure to cooperate with accommodation was due to symptoms of his disability.
- Greater onus on employer to exercise duty to inquire and accommodate – damages awarded.

31/10/2017

KOSKIE MINSKY LLP

19

Case Law Review

Lee v. Kawartha Pine Ridge District School Board , 2014 HRTO 1212

- Custodian developed acute anxiety based on traumatic interaction with his supervisor.
- Board accommodated by moving him to a different school, then attempted to move him again. Medical note stated he should stay put, but gave no reason so employer ignored it. Employee failed to report to work and was terminated.
- Board met substantive duty to accommodate but breached procedural duty by ignoring medical note.
- In ignoring request for accommodation, employer was discriminating by “disregarding the individual and rendering him invisible.”

31/10/2017

KOSKIE MINSKY LLP

20

Case Law Review

Burman v. Rest Haven Lodge and others, 2016 BCHRT 142

- Nursing assistant had a workplace accommodation in relation to a 2008 mental health diagnosis.
- Employer requested an independent medical examination in 2014.
- Report found no active condition diagnosable in DMS, but endorsed previous diagnosis and maintenance of the existing accommodation.
- Employer concluded that because there was no active diagnosis, there was no mental disability and no basis for accommodation.
- Complainant was dismissed for refusing to work without the accommodation.
- Tribunal held that medical evidence supported that there was a mental disability, which was currently symptom free and that if the accommodation was removed there was a risk of symptoms recurring.

31/10/2017

KOSKIE MINSKY LLP

21

Case Law Review

Baber v. York Region District School Board, 2011 HRTO 213

- Teacher suffered an acute anxiety attack in November, 2008 and went on sick leave.
- She provided a note from her doctor requesting that she be placed in a “teacher-librarian role”. The note did not specify her disability-related restrictions.
- Employer requested medical documentation specifying her restrictions.
- Teacher refused to provide further documentation.
- Tribunal dismissed the teacher’s application, stating that employee’s also have obligations during accommodation process, including providing adequate medical documentation to support their need for accommodation.

31/10/2017

KOSKIE MINSKY LLP

22

Case Law Review

***Niles v. Canadian National Railway Co.*, 1992 CanLII 8512 (FCA)**

- Niles exhibited increasing chronic and unexplained absenteeism, and other problematic behaviour.
- His superiors suspected alcoholism, and recommended treatment.
- About two years after this began, the CNR terminated Niles' employment.
- The court found Niles was accommodated to the point of undue hardship, citing that the CNR had: (i) tolerated 29 days of absenteeism in an eight-month period, and allowed Niles to claim the time as vacation time; (ii) tolerated a failure to report an accident with a company car, and ~\$1700 damage; (iii) tolerated him charging personal trips to his expense account; and (iv) suspended him initially (rather than terminating him), offering him an opportunity to rehabilitate himself.